



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KAJIADO**

**CASE NO. 99 OF 2017(O.S)**

**IN THE MATTER OF THE LIMITATION OF ACTIONS ACT (CAP 22 OF THE LAWS OF KENYA)**

**AND**

**IN THE MATTER OF AN APPLICATION FOR THE REGISTRATION OD LAND UNDER SECTION 38 OF THE LIMITATION OF ACTIONS ACT**

**BETWEEN**

**EXPORT PROCESSING ZONES AUTHORITY..PLAINTIFF/APPLICANT**

**AND**

**1. EMBAKASI RANCHING LIMITED**

**2. JAMES KIOI MUHURI t/a Manyatta Commercial**

**Agency, Manyatta Estates Agency, Trans Athi**

**Transporters and Masai Gypsum**

**3. MARY WAMBUI DICKSON**

**4. FLORENCE NJERI MAINA**

**5. JOEL MBURU**

**6. JEREMIAH MWEU MULILI**

**7. JAMES MACHARIA KARIUKI**

**8. PETER MAINA NDEGWA**

**9. GEORGE MAINA MICHAEL**

**10. FRANCIS MUIGA GITAH**

**11. MBANDU STORES LIMITED**

**12. DANIEL MUSYOKI.....DEFENDANTS/RESPONDENTS**

## RULING

The application for determination is dated 30<sup>th</sup> October, 2017 brought by the Plaintiff, pursuant to Order 51 Rule 1 of the Civil Procedure Rules, Sections 1A, 1B and 3A of the Civil Procedure Act. The application is based on the following grounds which in summary is that the order of the court dated the 2<sup>nd</sup> May, 2017 was duly served upon the Defendants/ and or persons trespassing on the suit properties on the 17<sup>th</sup> May, 2017. The persons have failed and/or refused to comply with the Order of the Court and have defiantly continued trespassing onto the suit properties, thus making the Plaintiff's operations on the suit parcels of land almost impossible. The Plaintiff's request for police assistance in ensuring compliance with the said Court's orders has been unsuccessful as the said Police have indicated that they cannot assist without a specific order in that regard.

The application is supported by the affidavit of FANUEL KIDENDA the Chief Executive Officer of the Plaintiff where he deposes that the Defendants have never filed any pleadings herein despite having been served by substituted service. He avers that on 2<sup>nd</sup> May, 2017 the Court issued orders of injunction against the Defendants, their agents and or contractors. Further that the said order was duly served on 17<sup>th</sup> May, 2017 upon the Defendants and/or their agents who were found trespassing on the suit land but they have failed and/or refused to comply with it. He claims his requests to the Police to assist in enforcing the court order has been unsuccessful.

The application is opposed by the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup>, 10<sup>th</sup>, 11<sup>th</sup> and 12<sup>th</sup> Defendants who authorized the 2<sup>nd</sup> Defendant JAMES KIOI MUHURI to swear two affidavits where he deposed that they are bona fide owners/purchasers of the suit properties having acquired the same from individuals whom they believed to be bona fide members of the 1<sup>st</sup> Defendant/Respondent. He avers that the Registrar of Lands at Kajiado issued them with title deeds for the suit properties situate in Kajiado County and registered as KAJIADO/NORTH KAPUTEI / 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 193, 194, 205, 206, 207, 208, 209, 210, 211, 214 and 215. He insists the titles are genuine as no claim has been raised on their authenticity by the Plaintiff, the Registrar of Lands and/or any other Government Agency. Further, there has been no claim for payment of the purchase price. He reiterates that the aforementioned parcels of land have never been part of the Export Processing Zone (EPZ) as there is a tarmac road that separates the two properties, with the said EPZ lying within Machakos County while the suit properties are in Kajiado County. He contends that they are not aware of the allegations on compulsory acquisition as against the 1<sup>st</sup> Defendant/Respondent since the suit properties were bought from individuals. Further, that EPZ is not known to them and neither have they been in possession of their suit properties since the date they became proprietors. He affirms that there are no buildings or infrastructures erected on the suit properties as it is just an open piece of land and they are strangers to the allegations that the said suit properties had been acquired by the Government compulsorily vide the alleged Gazette Notice No. 2802 and 2803 of 13<sup>th</sup> June, 1991. He alleges that the Registrar of Lands at Kajiado, National Land Commission and the County Government of Kajiado ought to be enjoined in this suit as they gave the relevant consents in the transfer of the suit properties to the Defendants. He claims there is a suit touching on some of the suit properties namely KAJIADO/KAPUTEI NORTH 131, 132, 133, 134, 139, 140, 141, 142, and 152 which is CIVIL SUIT NO. 271 OF 2016 - DANIEL MUSYOKI & 2 OTHERS VS EXPORT PROCESSING ZONE. Further that the National Land Commission vide a letter dated the 29<sup>th</sup> February, 2016 indicated that the aforementioned suit properties are private property and that there was no conservatory order issued in the aforementioned suit and hence this instant suit suffers from non disclosure of material facts. He reiterates that the Plaintiff /Applicant is not entitled to the orders sought in that this being an equitable relief, full and frank disclosure ought to be given to Court. He avers that the Plaintiff's allegations are untrue since they were issued with title deeds from the Registrar of Land and they paid all outgoings to the Ministry of Lands Kajiado, while the Plaintiff has not exhibited any title to all parcels of land acquired as claimed, with the claim of ownership being overtaken by time and cannot be enforced against them because there is no evidence of payment made individually to them. He confirmed that they do not reside on the suit properties as it is not developed as there are no buildings thereon and that they have not

employed anyone to guard it. He denied knowledge of one FRANCIS KATHITU named in the affidavit of service dated the 24<sup>th</sup> October, 2017. Further that the persons named in the affidavit of service to have been served are unknown to them as they are not employees, servants and/or agents neither can he and his fellow co respondents identify them physically. He further denies seeing the orders of the Court dated the 8<sup>th</sup> May, 2017 and state that they do not have any knowledge of the persons allegedly served with the Order and that there was no proper service of the said Orders upon them. He contends that the Orders were issued after an ex – parte hearing and they have never been given a chance to Counter the Orders as issued. He avers that they seek to be accorded an opportunity to be heard and that the Plaintiff should not seek to enforce orders obtained when the Court had no benefit of hearing the parties herein. He reiterates that the Orders were made without disclosure of material facts to Court, that the Plaintiff's claim lies elsewhere and the said Orders should be stayed so that the case can be heard on merit. He reaffirms that the instant applications seeks to enforce conservatory orders dated the 8<sup>th</sup> May, 2017 yet the application has not been argued.

The application proceeded for hearing on 4<sup>th</sup> December, 2017 where the Counsels for the Plaintiff and the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup>, 10<sup>th</sup>, 11<sup>th</sup> and 12<sup>th</sup> Defendants both submitted on it. Counsel for the Plaintiff Ms. Nzei reiterated the facts of the claim and stated that the Police declined to enforce the Court Order dated 8<sup>th</sup> May, 2017 unless it was expressly stating so. The 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup>, 10<sup>th</sup>, 11<sup>th</sup> and 12<sup>th</sup> Defendants' Counsel Ms. Mwencha opposed the application and relied on the replying affidavits and contested the mode of service as the same should be effected personally as practicable as possible. She submitted that the Respondents reside in Nairobi and process server did not serve them personally and they cannot be blamed for disobeying the court order which they had no knowledge of. Ms. Nzei reiterated that the Defendants/Respondents were served vide substituted service but did not file any response to the application as at 17<sup>th</sup> May, 2017. Further that service of the order of the Court was effected upon anybody found trespassing on the suit properties and they have to date failed to comply with the said order. She submitted that an order of the court should be obeyed.

### **Analysis and Determination**

Upon perusal of the application dated the 30<sup>th</sup> October, 2017 including the supporting affidavit and the replying affidavits as well as the annexures thereon, the only issue for determination at this juncture is whether the Officer Commanding Kitengela Police Station should enforce and ensure compliance with the Order of the Court dated the 2<sup>nd</sup> May, 2017.

I note the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup>, 10<sup>th</sup>, 11<sup>th</sup> and 12<sup>th</sup> Defendants were all served with the notice of motion application dated the 10<sup>th</sup> March 2017 and filed on 14<sup>th</sup> March, 2017 through substituted service but they never filed any response in respect of the application for injunction. I further note that thereafter the Plaintiff proceeded with the application and orders of injunction were granted on 2<sup>nd</sup> May, 2017 pending the hearing and determination of the suit.

It is the Plaintiff's contention that the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup>, 10<sup>th</sup>, 11<sup>th</sup> and 12<sup>th</sup> Defendants have failed to obey the court order despite service upon persons found trespassing on the suit properties. The 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup>, 10<sup>th</sup>, 11<sup>th</sup> and 12<sup>th</sup> Defendants deny knowledge of the persons served and state they reside in Nairobi and are the lawful owners of the suit parcels. Further they urge the court not to grant an order for compliance since the orders had been obtained ex parte. I note that the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup>, 10<sup>th</sup>, 11<sup>th</sup> and 12<sup>th</sup> Defendants despite being aggrieved with the said orders of injunction never sought for its review nor appealed from it.

Court orders are sacrosanct and ought to be obeyed. Any party that feels aggrieved has a remedy of filing for review and or appeal against the said order. In the instant motion, the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup>, 10<sup>th</sup>, 11<sup>th</sup> and 12<sup>th</sup> Defendants never opposed the application that led to the granting of the conservatory orders which the Plaintiff is seeking the services of the OCS Kitengela to enforce.

Section 63 (c ) and ( e) of the Civil Procedure Act stipulates as follows:' **in order to prevent the ends of justice from being defeated the court may, if it so prescribes ; grant a temporary injunction and in case of disobedience commit the person guilty thereof to prison and that his property be attached.**

**(e) make such other interlocutory orders as may appear to the court to be just and convenient.'**

I note the Plaintiff is simply seeking an enforcement of the Order which was already granted. The 2<sup>nd</sup> to 12<sup>th</sup> Respondents have in fact admitted that the suit properties are vacant with no building thereon and that they have never resided on it. They have further denied having agents on the said suit properties. This is a clear indication to Court that the persons served on the suit properties were indeed trespassers. They however insist the suit properties belong to them as they purchased the same from individuals. I find that since the Court already granted conservatory orders pending the outcome of the suit and this is not an application for review, the 2<sup>nd</sup> to 12<sup>th</sup> Defendants arguments on ownership of the suit properties will be heard and determined during the hearing of this suit. In the circumstances, I will allow this application and order as follows:

1. The Officer Commanding Kitengela Police Station do enforce and ensure compliance with the Order of the Court dated the 2<sup>nd</sup> May, 2017.

Costs will be in the cause.

Parties are urged to comply with Order 11 and set this suit down for hearing as soon as possible.

**Dated signed and delivered in open court at Kajiado this 22<sup>nd</sup> day of January, 2018.**

**CHRISTINE OCHIENG**

**JUDGE**